

Delegierte Rechtsetzung in der EU, Eine Analyse der Art. 290 und 291 AEUV

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Aims

The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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Establishment and Aims

The Common Market Law Review was established in 1963 in cooperation with the British Institute of International and Comparative Law and the Europa Instituut of the University of Leyden. The Common Market Law Review is designed to function as a medium for the understanding and analysis of European Union Law, and for the dissemination of legal thinking on all matters of European Union Law. It aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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Daniel Kollmeyer, *Delegierte Rechtsetzung in der EU – Eine Analyse der Art. 290 und 291 AEUV*. Baden-Baden: Nomos, 2015. 386 pages. ISBN: 9783848724383. EUR 99.

This book is the published version of Kollmeyer's doctoral dissertation completed in May 2014 and defended in January 2015. These dates are important, since a number of important rulings by the Court of Justice have since followed. Kollmeyer has produced a sound work in relatively accessible German (although some familiarity with German public law is required to follow some of the reasoning) on a topic of huge constitutional and day-to-day importance in EU law. Although this topic lends itself to metaphysical debates on constitutional and EU law, Kollmeyer successfully steers clear of this trap, resulting in a "hands on" text, grounded in actual and richly documented institutional practice and linked to the existing doctrinal debate. As regards doctrine however, Kollmeyer only draws from sources written in German and English and the book misses an index and, above all, a list of cases which would have further enhanced its value for researchers and practitioners.

Since the Treaties only explicitly foresee a delegation of powers to the Commission and Council, the book's main focus is on Articles 290 and 291 TFEU (p. 15). Kollmeyer rightly notes that "comitology", which was fundamentally reformed by the Lisbon Treaty, has only sparsely been studied in a serious manner (pp. 20–22) and this in contrast to its quantitative importance (according to some calculations, it amounts to 97% of all EU output, p. 17).

In a first part, Kollmeyer explores the EU notion of *Rechtsetzung*, which is not defined by the Treaties (p. 26). For the purposes of his study, *Rechtsetzung* implies formally binding acts (p. 28) of general or individual scope (p. 30; commonly one would understand *Rechtsetzung* only as referring to acts of general scope) adopted by EU institutions or bodies (not by private entities; p. 29), regardless of whether they have internal (e.g. interinstitutional agreements) or external legal effects (p. 33). Next, Kollmeyer attempts to define the concept of delegation, since again primary law provides no definition (p. 34). Kollmeyer notes that the well-known (in German public law) delegation notions developed by Triepel and Barbey do not fully apply in EU law and that a broader but EU-specific notion ought to be adopted. Kollmeyer then borrows the delegation notion from Fischer-Appelt: "the transfer of powers from one body to another or a third body to act on its own, whereby the authority losing power and the authority transferring power do not necessarily have to be the same." While it is presented as a broad EU-specific delegation concept, the definition actually is a variant to that of Barbey. More generally one is left wondering whether there is (or should be) a single delegation concept in EU law and why there could not be several distinct delegation regimes.

The second part of the book describes the development of the comitology system up until the entry into force of the Lisbon Treaty (pp. 41–96), while the third part deals with the fundamental principles in EU law and their significance for *Rechtsetzung* in the EU. Kollmeyer thus sets out his understanding of the EU principle of democracy (pp. 104–110): based on a dual legitimacy (Art. 10 TEU), one should differentiate between the EU citizen being affected in his individual capacity and in his capacity as member of his "nation" in order to identify the degree to which the different EU institutions should be involved in any given decision-making procedure. Other relevant principles include those of conferral, subsidiarity, and proportionality, but Kollmeyer does not include the principle of institutional balance. Instead, to answer the question to what extent a delegating authority may transfer powers to a delegate authority, Kollmeyer looks at the *Rechtsstaatsprinzip* (p. 112).

In the fourth part of the book, Kollmeyer comes to the core of his research, viz. delegated rulemaking under the Lisbon Treaty. The first question in this regard relates to the realms of Articles 290 and 291 TFEU: are they mutually exclusive or overlapping? In the latter case, does this not undermine the different control regimes? In this regard, Kollmeyer, like many commentators, is critical of the Court's approach in *Biocides* (C-427/12). Indeed, in light of the fundamental principles of EU law identified in the third part, he finds that the Court's approach in *Biocides* comes down to a capitulation to the institutional practice rather than that practice being informed and structured by the new provisions in primary law (p. 133). It should be noted here that in *Visa reciprocity* (C-88/14), decided after the conclusion of the book under review, the Court again confirmed its approach in *Biocides*. The key notions in Article 290 then are "amend" and "supplement"; Kollmeyer tries to identify their meaning post-Lisbon by looking at the Court's pre-Lisbon case law and the post-Lisbon institutional practice. Kollmeyer concludes that while there are different types of amendment (pp. 152–153), they all result in a formal change of the basic act (the latter is unclear however following *Visa reciprocity*). He further finds that "supplementation" has a meaning distinct from "amendment" and cannot simply be subsumed thereunder (p. 155). Kollmeyer then turns to the question in how far implementing acts may amend or supplement a basic act (p. 163). While one would think they could never be used for an amendment, Kollmeyer points to the interesting case of the freezing of assets of terrorist suspects (pp. 172–175).

As noted by other commentators the most significant overlap between Articles 290 and 291 TFEU lies in the notion of supplementation, since either act will always "add" something to the basic act and both types of act could thus be used to achieve the same results. Still, Kollmeyer notes that the implementing act also has a function different from the delegated act since it is

often used to establish organizational and procedural rules structuring the cooperation between the Commission and Member States' administrations. Implementing acts may then also be used to narrow the discretionary margin available to those national administrations when they implement EU law. According to Kollmeyer, however, it remains problematic that the formal criteria listed in Articles 290 and 291 TFEU do not allow for a clear separation between the two, meaning further criteria should be identified in order to come to a more sound system (pp. 179–180). Of course this issue has only been aggravated by the *Visa reciprocity* case. Crucially, Kollmeyer rejects the idea that Article 291 TFEU divides competences vertically (EU-MS) (pp. 184–193) claiming instead that Article 291(1) is purely declaratory in light of Article 4(3) TEU (p. 193). The argument set out to this end is not entirely clear and fails to convince that Article 291(1) TFEU should not be seen as confirming the Member States as the primary locus of executive power in the integrated EU legal order. Of course, this could be the topic of further research and debate.

In order to come to a clearer demarcation between the two Articles, Kollmeyer then draws on his findings on the *Demokratieprinzip* to argue that implementing acts should serve to establish intra-EU working arrangements and to steer the implementation of EU law by the Member States, but should not have external effects *vis-à-vis* market operators or citizens (this indeed means that EU authorizations -e.g. in the chemicals, medicines and food sectors – would no longer be adopted in the form of implementing acts, p. 198). For this, delegated acts should be used. Kollmeyer adds to this that implementing acts should no longer be adopted in the form of regulations (p. 197). This is not the case for delegated acts which, furthermore, may be used to regulate every matter that comes within the scope of the implementing act (except for adopting individual measures) and the legislative act (except for the essential elements). Kollmeyer links the identified functions of an implementing act to the discussion in German administrative law on *Verwaltungsvorschriften* (technical circulars, at issue in C-361/88, *Commission v. Germany*). However, this is one of the instances in which the readers who are not familiar with German public law (cf. *supra*) will have a hard time following the author's reasoning. That said, Kollmeyer's proposal is quite radical and completely novel in the debate on Articles 290 and 291 TFEU (at least to this reviewer's knowledge). As the author notes, his understanding of those Articles may be fully integrated and would support the *Rechtsstaatsprinzip*, *Demokratieprinzip*, hierarchy of norms, etc. At the same time it is a radical departure from pre- and post-Lisbon practice, and contrary to the (widely shared) belief that the splitting up of Article 202 EC into Articles 290 and 291 TFEU was a mere recognition of an already existing reality. As already hinted at, while Kollmeyer's argument may have become even more attractive in the light of the Court's recent case law, that case law has also greatly dimmed the prospects of his understanding of Articles 290 and 291 TFEU actually being adopted.

Kollmeyer's proposal on the ambits of Articles 290 and 291 TFEU of course has further ramifications. Kollmeyer rightly notes that the Treaties' conception of what constitutes a legislative act (a seemingly straightforward question) is far from transparent (pp. 200–222), *inter alia* because the Treaties contain several legal bases allowing the immediate adoption of executive acts (see e.g. Art. 43(3) TFEU) which in a material sense are legislative. Following Kollmeyer's proposal, if such acts subsequently need to be "supplemented" through acts having external effects, delegated acts should be used. However, this would go against the wording of Article 290 TFEU, which refers to legislative acts as basic acts (pp. 223–224). Kollmeyer next explores the notion of essential elements, analysing the Court's pre- and post-Lisbon case law, noting that the aspect of fundamental rights is insufficiently integrated therein (p. 258). Article 290 TFEU does not only reserve these essential elements to the legislature but also instructs the latter to lay down the "objectives, content, scope and duration of the delegation". This requirement of specificity is found to complement the requirement on essential elements (pp. 264–272). The volume proceeds by describing the function of the control mechanism foreseen in Article 290 TFEU (pp. 279–290) and explores the possibility to involve further actors (other than those explicitly foreseen in Art. 290 TFEU) in the decision-making process. In this regard Kollmeyer points to the *de facto* continued survival of the (comitology) advisory procedure under Article 290 TFEU, but he does not find it legally problematic as long as it does

not nullify the Commission's formal competence to adopt delegated acts (pp. 291–313). Turning to the control regime under Article 291 TFEU, Kollmeyer discusses the new Comitology Regulation, *inter alia* finding that the criteria prescribed by the Regulation to identify the correct procedure are unworkable (pp. 313–342). The issue is addressed through a bird's eye perspective, meaning Kollmeyer does not look into the actual functioning of comitology committees (which could of course easily have doubled the book's size). As regards the possibility, foreseen in Article 291(2) TFEU, to empower the Council in duly justified cases to adopt implementing acts, Kollmeyer finds that it simply confirms the possibility for the Council to adopt executive acts in those cases explicitly foreseen by the Treaties (e.g. Art. 43(3) TFEU) but that it does not have any significance in and of itself, meaning it should be deleted on the occasion of a next Treaty revision (pp. 343–351). Lastly, Kollmeyer briefly addresses the relationship between the EU agencies and Articles 290–291 TFEU, finding that the former can never be empowered to adopt delegated or implementing acts, thereby acknowledging that there is a significant gap between legal reality and primary law (pp. 351–356). Kollmeyer concludes by deploring the Court's refusal in *Short-selling* (C-270/12) and *Biocides* to uphold the Lisbon Treaty's original reform, inviting the Court to correct its case law.

With this book, Kollmeyer presents a complete and well-organized inventory of both the history of as well as the current legal framework for “delegated rulemaking” in the EU. The book addresses all the key issues in this area and engages with the Court's relevant jurisprudence. Kollmeyer makes several significant suggestions for reform, which may however appear rather ambitious, especially in the light of the Court's recent case law. For those reading German and interested in knowing the ins and outs of the system of executive rulemaking of Articles 290 and 291 TFEU the book will be a very valuable tool.

Merijn Chamon
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